

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
ASAP Paging, Inc.)	WC Docket No. 04-6
)	
Petition for Preemption of the Public Utility)	
Commission of Texas Concerning Retail)	
Rating of Local Calls to CMRS Carriers)	
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SPRINT COMMENTS

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Summary

Sprint supports the ASAP petition for preemption of a Texas PUC order holding that wireless carriers cannot offer an inbound local calling area comparable to the local area that an incumbent LEC offers to its own customers unless it installs a switch in each local calling area. This order conflicts with federal law on the following grounds:

1. The PUC order creates an impermissible entry barrier in contravention of Section 253(a) of the Communications Act. The FCC has held that Section 253(a) bars states from “restricting the means or facilities through which a party is permitted to provide service.” The Texas PUC order has the effect of prohibiting entry and inhibiting intermodal competition. Under the order, wireless carriers must either (a) purchase or install an unnecessary switch in each local calling area, which will dramatically increase the price of wireless service, or (b) maintain an efficient network architecture, but accept that all calls to wireless customers would become toll calls. Adoption of either alternative would greatly inhibit the ability of wireless carriers to compete with the incumbent LEC, and as such, has the effective of prohibiting entry.

2. The PUC order constitutes impermissible entry regulation in contravention of Section 332(c)(3) of the Act. Federal courts have held that under Section 332(c)(3) the placement of network infrastructure by wireless carriers for the provision of their services is exclusively within the domain of the FCC. The Texas PUC is without authority to dictate to wireless carriers what infrastructure they must use in the provision of their wireless services.

3. The PUC order impermissibly permits CenturyTel to violate the dialing parity obligations of Section 251(b)(3). The Act requires incumbent LECs to provide dialing parity, including dialing parity to wireless carriers. Under the challenged order, CenturyTel may allow its customers to call a neighbor served by CenturyTel by dialing only seven digits, but requires its customer to dial eight digits (and pay toll charges) if the neighbor instead uses wireless service.

4. The PUC order conflicts with federal numbering rules. Section 251(e)(1) of the Act gives the FCC exclusive jurisdiction over telephone numbers. The FCC rules specify that a wireless carrier can obtain local numbers in any LEC rate center where it is authorized to provide service. The PUC lacked the authority to impose a second condition on the use of local telephone numbers – namely, that a wireless carrier must also install a switch in the LEC rate center.

The FCC should further declare that CenturyTel’s actions constitute an unreasonable practice under Section 201(b) of the Act. The option that CenturyTel has given to wireless carriers – dramatically increase service prices to recover the costs of unnecessary switch capacity, or forfeit the right to offer a competitive inbound local calling area to wireless customers – is blatantly discriminatory and anticompetitive, and constitutes an unreasonable practice under the Act.

Finally, there is no basis to preempt any Texas statute or PUC rules. As the petitioner acknowledges, the statutes and rules that it recites do “not on their face conflict with federal law.”

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SPRINT COMMENTS

Sprint Corporation, on behalf of its local, long distance and wireless divisions ("Sprint"), submits these comments in response to the ASAP Paging Petition for Preemption of the Public Utility Commission of Texas Concerning Retail Rating of Local Calls to CMRS Carriers ("ASAP Petition").¹

The ASAP Petition highlights again the need for this Commission to act quickly on the many outstanding disputes between wireless carriers and small incumbent local exchange companies ("ILECs") currently pending before the Commission.² ILECs will continue to avoid their interconnection responsibilities until this Commission begins to enforce the terms of the Act and its rules. As with wireless number portability, the Sprint Rating and Routing Petition, and the T-Mobile Tariff Petition, this proceeding is simply another example of an ILEC attempting to avoid its obligation to deliver traffic to other networks and to place competitors at a regulatory

¹ See *Public Notice*, Pleading Cycle Established for Petition of ASAP Paging, Inc. For Preemption of the Public Utility Commission of Texas Concerning Retail Rating of Local Calls to CMRS Carriers, WC Docket No. 04-6, DA 04-92 (Jan. 20, 2004).

² While Sprint specifically addresses the wireless issues presented by the ASAP petition, Sprint notes that these disputes are not limited to wireless carriers. CLECs and all new entrants that compete in territories served by small ILECs face many of the same challenges.

(and cost) disadvantage in the market place. In this case, the ILEC has attempted to manipulate the definition of its own local calling scope in order to avoid its obligation to deliver traffic to a paging carrier.

Under the CenturyTel decision, incumbent LECs can prevent wireless carriers from offering their customers an inbound local calling area comparable to that which LECs offer their own customers. Indeed, under the regime that the Texas Commission appears to have endorsed, incumbent LECs like CenturyTel can convert most land-to-mobile calls into toll calls – including when the wireless customer is physically located in the same neighborhood as the calling LEC customer. These arrangements conflict with controlling federal law and must be preempted. Intermodal competition in the local telecommunications market can never flourish if LECs can convert the vast majority of land-to-mobile calls into toll calls.

I. BACKGROUND FACTS

A. ROUTING AND RATING OF LAND-TO-MOBILE TRAFFIC GENERALLY

1. Land-to-Mobile Call Routing. FCC rules specify that a LEC “must provide the type of interconnection reasonably requested by a mobile service licensee.”³ The most prevalent form of interconnection used by most commercial mobile radio service (“CMRS”) providers is Type 2A interconnection. With Type 2A interconnection, a CMRS carrier’s mobile switch connects directly to the LATA tandem switch, just as LEC end office switches connect directly to the LATA tandem switch.⁴ Type 2A thus provides indirect interconnection with all other switches that subtend the LATA tandem switch, whether the subtending switch is owned by an incumbent

³ 47 C.F.R. § 20.11(a).

⁴ In contrast, Type 2B interconnection involves a direct connection to an end office switch, but Type 2B interconnection still requires use of Type 2A for “overflow traffic.” See *CMRS Interconnection*, 9 FCC Rcd 5408, 5451-52 ¶ 105 (1994).

LEC (including rural LECs), a competitive LEC, or another CMRS provider.⁵ To route a land-to-mobile call, a LEC forwards its customer's call from its end office switch to the LATA tandem switch, where the call is then switched and transported to the subtending mobile carrier switch.⁶ Rural LECs acknowledge that indirect interconnection is often the most efficient form of interconnection given the small traffic volumes they exchange with other carriers.⁷

2. Financial Obligations. LECs have the statutory "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."⁸ Under FCC rules, traffic exchanged between a LEC and wireless carrier is subject to "reciprocal compensation" when the call originates and terminates in the same Major Trading Area ("MTA").⁹ When exchanging intraMTA traffic, the originating carrier must, upon request, compensate the terminating carrier for call termination – defined as "switching of telecommunications traffic at the terminating carrier's end office switch . . . and delivery of such traffic to the called party's premises."¹⁰ And, the originating carrier has a duty to pay for transport – defined as facilities obtained by the terminating carrier from "the interconnection point . . . to the terminating carrier's end of-

⁵ The FCC has recognized that wireless carriers can choose to interconnect indirectly with LECs "based upon their most efficient technical and economic choices." *See First Local Competition Order*, 11 FCC Rcd 15499, 15991 ¶ 997 (1996). *See also* 47 U.S.C. § 251(a)(1); *Virginia Arbitration Order*, 17 FCC Rcd 27039, 27085 at ¶ 88 (2002).

⁶ For ease of explanation, these examples assume a single tandem switch in the LATA. The same principle applies where multiple tandems exist within a LATA. However, other issues of interconnection between tandems may need to be addressed in that context.

⁷ *See, e.g.,* National Telecommunications Cooperative Association ("NTCA") Ex Parte, CC Docket No. 01-92 (March 10, 2004), *attaching* NTCA, *Bill and Keep: Is It Right for Rural America*, at 41 (March 2004) ("Since all carriers in a service area or market must at some point connect to the area tandem, there is efficiency in utilizing the tandems to route calls to other carriers instead of building a direct connection to each carrier.").

⁸ 47 U.S.C. § 251(b)(5).

⁹ *See* 47 C.F.R. § 51.701(b)(2).

¹⁰ 47 C.F.R. § 51.701(d). *See also id.* at §§ 20.11(b), 51.703(a).

fice switch that directly serves the called party.”¹¹ FCC rules explicitly prohibit LECs from charging the terminating carrier for traffic (subject to reciprocal compensation) that “originates on the LEC’s network.”¹² This includes a prohibition on charges for the facilities the LEC uses in delivering its traffic to the terminating carrier.¹³

For example, in a mobile-to-land call to a customer served by a rural LEC (“RLEC”), the wireless carrier, as the originating carrier, bears the cost of delivering its customers’ calls from its switch in the LATA to the RLEC switch serving the person being called. Similarly, for an intraMTA land-to-mobile call, the RLEC bears the cost associated with delivering its customers’ calls to the wireless carrier switch serving the person being called – even if the interconnection point is not located within the originating local calling area, as is necessarily the case with indirect interconnection.¹⁴ As one RLEC trade association has noted, “the carrier that originates the call will pay the transiting function.”¹⁵ In other words, the obligation to deliver one’s traffic to the destination carrier’s switch serving the called party is the same, whether the originating carrier is a wireless carrier or a LEC.

The FCC recognized that these rules would place a burden upon both incumbent LECs and new entrants, but indicated it was entirely appropriate for each party to bear the cost of

¹¹ *Id.* at § 51.701(c). Competitive carriers must maintain at least one point of interconnection (“POI”) in each LATA. *See, e.g., Unified Inter-carrier Compensation NPRM*, 16 FCC Rcd 9610, 9634 ¶ 72 (2001); *Virginia Arbitration Order*, 17 FCC Rcd 27039, 27064 at ¶ 52 (2002). Type 2A interconnection is consistent with this single POI per LATA rule.

¹² *See id.* at § 51.703(b). *See also TSR Wireless v. US WEST*, 15 FCC Rcd 11166 (2000), *aff’d* 252 F.3d 462 (D.C. Cir. 2001).

¹³ *See id.*

¹⁴ *See, e.g., Southwestern Bell v. Texas Public Utilities Comm’n*, 348 F.3d 482 (5th Cir. 2003); *Mountain Communications v. FCC*, 355 F.3d 644 (D.C. Cir. 2004); *MCImetro v. BellSouth*, 352 F.3d 872 (4th Cir. 2003). As noted below, this transport obligation does not extend beyond the LATA boundary since each carrier must maintain at least one POI per LATA.

¹⁵ National Telecommunications Cooperative Association (“NTCA”) Ex Parte, CC Docket No. 01-92 (March 10, 2004), *attaching NTCA, Bill and Keep: Is It Right for Rural America*, at 40 (March 2004).

transporting its own traffic: “the incumbent and the new entrant are co-carriers and each gains value from the interconnection arrangement. Under these circumstances, it is reasonable to require each party to bear a reasonable portion of the economic costs of the arrangement.”¹⁶

3. Land-to-Mobile Call Rating. Mobile customers expect that their neighbors will be able to call their mobile handset on a local basis, just as neighbors can call them at their landline telephone on a local basis. As a result, since the inception of the mobile telephony industry two decades ago, wireless carriers have followed the LEC convention for the rating of LEC customer calls, so mobile customers can enjoy an inbound calling area comparable to what the incumbent LEC offers its own customers.

It is commonly said that LECs rate their land-to-land calls based on the physical location of the calling and called parties – namely, a LEC treats a call as local if the two parties are located in the same local calling area. In fact, LEC billing systems rate calls based not on the physical location of their customers, but on the telephone numbers assigned to them. As the Commission recently recognized, “at all relevant times, industry practice among local exchange carriers similarly appears to have been that calls are designated as either local or toll by comparing the NPA-NXX codes of the calling and called parties”:

[F]or purposes of billing its own customers, Verizon South always has rated calls to Starpower telephone numbers as either local or toll based on the NPA-NXX code assigned to the Starpower customer.¹⁷

¹⁶ *First Local Competition Order*, 11 FCC Rcd 15499, 15781 ¶ 553 (1996).

¹⁷ *Starpower v. Verizon South*, FCC 03-278, 18 FCC Rcd 23625 at ¶ 17 (Nov. 7, 2003). *See also Mountain Communications v. FCC*, 355 F.3d 644, 645 (D.C. Cir. 2004) (“Qwest determines whether a customer’s call is a toll call by comparing the number of the call with the number of the person being called.”); *Virginia Arbitration Order*, 17 FCC Rcd 27039, 27181-82 ¶ 301 (2002); BellSouth LNP Comments, CC Docket No. 95-116 at 7 (Jan. 20, 2004) (“Today, local and toll calls are rated based upon the ‘To’ NPA/NXX and ‘From’ NPA/NXX.”); Verizon LNP Comments, CC Docket No. 95-116 at 5 (Jan. 20, 2004) (“Carrier billing systems determine the end points of a call – and, therefore, how a call is to be billed – based on the NXXs of the calling and called telephone numbers.”).

Under the LEC industry's long standing billing convention for land-to-land traffic, the telephone number of the party being called is used as the surrogate for the person's physical location.

Given this LEC convention, CMRS providers generally assign NXX codes to their end user customers based upon the rate center the customer is most expected to use their mobile phone. By obtaining NXX codes (now thousands blocks) rated to different LEC local calling areas, wireless customers can receive calls from friends and family within the same community of interest (and the location they most use their phone) on a local basis. As the Commission has acknowledged:

[I]t is typically necessary for each facilities-based service provider to be assigned an NXX code for each rate center in which it provides service. . . . [W]ireless carriers . . . often must request as many NXX codes as are required to permit wireless customers to be called by wireline customers on a local basis.¹⁸

Of course, "because wireless service is mobile and not fixed to a specific location, while the wireless subscriber's number is associated with a specific geographic rate center, the wireless service is not limited to use within that rate center."¹⁹ Thus, if a person calls a neighbor at his wireless handset, the LEC rates the call as local even though the neighbor may be traveling in another rate center at the time of the call.²⁰ Likewise, the LEC imposes toll charges on calls to an NXX rated to another rate center, even if the mobile user is in fact located within the originating rate center. Indeed, the LEC may impose toll charges on its end user customer even if the switch serving the mobile customer is located in the same rate center as the originating LEC switch and the call never leaves that exchange.

¹⁸ *Numbering Resource Optimization NPRM*, 14 FCC Rcd 10322, 10370-71 ¶ 112 (1999). *See also id.* at 10371 n.174 ("[T]o enable the rating of incoming wireline calls as local, wireless carriers typically associated NXXs with wireline rate centers that cover either the business or residence of end-users.").

¹⁹ *Intermodal Porting Order*, FCC 03-284, 18 FCC Rcd 23697 at ¶ 11 (Nov. 10, 2003).

²⁰ The terminating CMRS carrier bears the additional cost of delivering the call to the end user's actual location.

Three points bear emphasis in summary. First, with Type 2A interconnection, the routing point (LATA tandem switch) is generally different than the rating point (a particular ILEC rate center).²¹ Industry standards explicitly acknowledge that carriers can designate different routing and rating points for their numbers.²² Likewise, Commission orders and rules permit a carrier to have different routing and rating points. For example, a carrier may have a single point of interconnection (“POI”) in a LATA (e.g., Type 2A interconnection),²³ but with numbers rated to multiple LEC rate centers where they provide service.²⁴

Second, for traffic subject to the reciprocal compensation rules, the originating carrier bears the cost of delivering its customers’ calls to the terminating carrier’s switch serving the called party – even if that switch is not located in the same local calling area as the calling party. This obligation, limited to carrying traffic to a POI within the LATA, applies equally to all carriers, whether LECs or CMRS providers.

Third, LECs rate their customer’s calls as local or toll – particularly with respect to calls to wireless customers – based not on the physical location of the called party, but rather on the telephone number assigned to the called party. For wireless service, carriers generally assign NXX codes associated with the rate centers within which their customers most use their mobile phones. When the NPA-NXXs of the calling and called parties are rated to the same local calling area, the LEC treats the call as local even though the called party may not be physically lo-

²¹ The only time the rating and routing points would be the same is when a mobile customer happens to request a telephone number rated to the same ILEC rate center where the mobile switch is physically located. This is pure coincidence because a mobile customer does not know (and does not care) where its service provider locates its network equipment.

²² See Central Office Code (NXX) Assignment Guidelines, INC 95-0407-008, at § 6.2.2 (Nov. 21, 2003) (“Each switching center, each rate center and each POI may have unique V&H coordinates.”).

²³ See, e.g., *Mountain Communications v. FCC*, 355 F.3d 644 (D.C. Cir. 2004); *MCImetro v. BellSouth*, 352 F.3d 872 (4th Cir. 2003); *Southwestern Bell v. Texas Public Utilities Comm’n*, 348 F.3d 482 (5th Cir. 2003).

cated in the local calling area at the time of the call. The reverse is also true. When the NPA-NXX of the calling and called parties are rated to different local calling areas, the LEC treats the call as a toll charge even though the called party may be physically located in the same local calling area at the time of the call.

B. THE ASAP/CENTURYTEL CONTROVERSY

ASAP provides its paging services in the Austin, Texas LATA, including in the San Marcos exchange (served by CenturyTel) and Lockhart exchange (served by SBC), *via* radio transmitters located in San Marcos and Lockhart.²⁵ CenturyTel's San Marcos' exchange and SBC's adjacent Lockhart exchange are in the same local calling area, as a result of a mandatory extended area service ("EAS") arrangement – known in Texas as expanded local calling service ("ELCS").²⁶ Consequently, a call made by a CenturyTel customer in the San Marcos exchange to an SBC customer in the Lockhart exchange is treated as a local call.²⁷

ASAP connects to the public switched telecommunications network ("PSTN") using a Type 2A interconnection with the SBC tandem switch in Austin to which CenturyTel is also connected.²⁸ Thus, CenturyTel routes a call by one of its customers in San Marcos to an ASAP customer in San Marcos over the trunk group connecting its end office switch to the Austin tan-

²⁴ See, e.g., 47 C.F.R. § 52.15(g).

²⁵ See *Complaint of ASAP Paging Against CenturyTel of San Marcos*, PUC Docket No. 25673, *Order*, at 11 ¶ 17 and 13 ¶ 34 (Oct. 9, 2003) ("TPUC Order"). San Marcos is located on I-35 approximately 30 miles southwest of Austin. Lockhart is located 15 miles east of San Marcos and 30 miles south of Austin.

²⁶ See TPUC Order at 1-2. The FCC has noted that flat-rated, non-optional ELCS is a "traditional local service." See, e.g., *Southwestern Bell ELCS LATA Modification Order*, 18 FCC Rcd 6570, 6571 ¶ 2 (2003).

²⁷ See TPUC Order at 14-15 ¶¶ 43-44. The Fentress and Kyle exchanges (served by Verizon) are also included in this ELCS local calling area. See *id.* at 14-15 ¶ 43.

²⁸ See *id.* at 10 ¶¶ 12 and 15.

dem switch, where the call is switched for delivery to ASAP's switch in Austin and ultimately terminated to the end user, whether located in San Marcos or some other area served by ASAP.²⁹

ASAP has obtained the NXX code, 512-384, which it associated with, or "rated" to, SBC's Lockhart exchange.³⁰ ASAP assigns telephone numbers from this NXX code to its customers residing in both Lockhart and San Marcos (because they are in the same local calling area), so their neighbors can call their pager on a local basis. As discussed above, this fixed NXX rating assignment is necessary to accommodate LEC billing systems. Because mobile customers do not have a fixed location, a single rate center must be selected to permit the LEC to rate its calls. As a general matter, the rate center selected is associated with the rate center in which the end user has a community of interest and is most expected to use the service. Without its own set of local telephone numbers, family, friends and colleagues of ASAP's paging customers would incur toll charges in calling ASAP customers in the same exchange.

CenturyTel historically rated calls to ASAP utilizing the long-standing industry convention – that is, it treated as local customer calls to an ASAP customer with a locally rated number (512-384), and billed toll charges (or routed to a presubscribed IXC) for customer calls to an ASAP customer with a number not rated to the local calling area.³¹ However, beginning on April 2, 2002, and apparently without providing any notice to ASAP,³² CenturyTel "changed its

²⁹ See *id.* at 15 ¶ 48. At all times relevant, CenturyTel was not charged for the trunk connecting its San Marcos switch and the SBC tandem switch in Austin. See *id.* at 15 ¶ 50. Although CenturyTel has characterized this trunk as a "toll trunk," the PUC ruled that this characterization does "not, in itself, affect the eligibility of a call passing over that trunk for ELCS treatment." *Id.* at 18 ¶ 23.

³⁰ See TPUC Order at ¶ 33.

³¹ See TPUC Order at 14 ¶ 42 ("[U]ntil April 1, 2002, CenturyTel delivered calls toll-free to the ASAP NXXs in dispute."). For example, if an ASAP customer had a number rated to the Austin local calling area, CenturyTel would assess toll charges even if, at the time of the call, the ASAP customer happened to be located in CenturyTel's San Marcos exchange.

³² See ASAP Petition at 13 n.16.

switch translations so that callers from San Marcos had to dial 1+ or 0+ to call ASAP's NXXs, and CenturyTel began charging its customers toll for such calls."³³

ASAP immediately filed a complaint with the Texas Commission.³⁴ On April 18, 2002, an administrative law judge ("ALJ") entered an interim order "requiring CenturyTel to cease requiring 1+ or 0+ dialing to call these NXXs and to cease charging toll for such calls, pending a final ruling in this case."³⁵ The next year, on April 24, 2003, the ALJ entered a proposed order recommending that ASAP's complaint be denied, but the injunction against CenturyTel was not lifted.³⁶ Six months later, on October 9, 2003, the Texas Commission released its order denying ASAP's complaint.³⁷ ASAP's reconsideration petition was denied automatically when the Texas Commission took no action on the petition within the statutory time frame.³⁸

C. THE TEXAS COMMISSION ASAP/CENTURYTEL ORDER

In its order, the Texas Commission stated that "[t]he location of the calling customer and the called customer should be used for purposes of retail rating ELCS calls" – that is, whether calls should be rated as local or toll.³⁹ The Texas Commission further noted that with regard to calls to mobile customers, it is "not possible" for CenturyTel to "determine the geographic location where a wireless paging call is received by an ASAP paging customer."⁴⁰

³³ TPUC Order at 14 ¶ 42.

³⁴ See TPUC Order at 9 ¶ 3.

³⁵ TPUC Order at 14 ¶ 42. See also ASAP Exhibit 4.

³⁶ See ASAP Exhibit 5.

³⁷ See ASAP Exhibit 1.

³⁸ See ASAP Petition at 13.

³⁹ See *Complaint, Request for Expedited Ruling, Request for Interim Ruling, and Request for Emergency Action of ASAP Paging, Inc. Against CenturyTel of San Marcos, Inc.* PUC Docket No. 25673, Order, at 17 ¶ 19 (Oct. 9, 2003) ("TPUC Order").

⁴⁰ TPUC Order at 11 ¶ 20.

ASAP noted in its briefs the long-standing LEC industry convention to rate as local or toll calls to mobile customers based on the NXX association of the mobile customer's telephone number, which is the same practice LECs utilize in rating FX calls as local, even though the FX customer is not physically located in the originating exchange.⁴¹ The Texas Commission inexplicably did not address this point in its order. Rather, it ruled that for CenturyTel customer calls to ASAP customers, "ASAP is the called customer for purposes of retail rating."⁴² Because ASAP's mobile switch is located in Austin and because Austin is in a different local calling area than San Marcos, the PUC then held that CenturyTel "must assess" toll charges on its customers when they call ASAP customers – including when the ASAP customer is physically located in the San Marcos local calling area and even though the ASAP customer has a local telephone number assigned to the local calling area.⁴³

The justification for the Texas Commission's conclusion – that the called party for billing purposes is not the person being called but that person's service provider's switch – was limited to the following two sentences:

[T]he Commission finds that, for purposes of determining whether a paging call is an ELCS [*i.e.*, local] or toll call under the specific facts of this case, CenturyTel's customers are calling ASAP's paging service at ASAP's mobile telephone switching office located in Austin. Therefore, calls to these ASAP NPA-NXXs from CenturyTel's customers in San Marcos are outside of the ELCS calling area and may not be rated as ELCS.⁴⁴

⁴¹ See, e.g., ASAP Paging Exceptions to Proposal for Decision, PUC Docket No. 25673, at 6-8, 14-17 and 21 (May 3, 2003).

⁴² TPUC Order at 18 ¶ 29.

⁴³ See *id.* at 7. The PUC made this ruling even though its staff found that "ASAP has shown that CenturyTel is obligated by its own tariff to not charge its end user for these calls." Staff Initial Post-Hearing Brief, PUC Docket No. 25673, at 1 (Jan. 29, 2003).

⁴⁴ TPUC Order at 7.

In making this ruling, the Texas Commission stated that calls to “ASAP’s NXXs do not terminate within those [San Marco and Lockhart] exchanges.”⁴⁵ This statement, however, is incompatible with the Texas Commission’s factual determination that ASAP operates radio transmitters in both San Marcos and Lockhart – that is, CenturyTel customers in San Marcos calling an ASAP customer with a locally rated number can terminate in the originating local calling area.⁴⁶ Indeed, an ASAP customer with no association with the San Marcos local calling area would have little interest in acquiring a locally rated number, because most calls to the customer would then be treated as toll calls.

The Texas Commission therefore denied ASAP’s complaint and vacated the injunction that had been imposed on CenturyTel.⁴⁷ Shortly thereafter, CenturyTel advised ASAP that effective November 1, 2003, “calls previously dialed on a 7-digit basis to these NPA/NXXs will require 1+ or 0+ dialing to be completed.”⁴⁸

Under the Texas Commission’s order, friends, family and colleagues of ASAP customers residing in San Marcos can no longer make a local call in order to contact an ASAP San Marcos customer – unless ASAP installs a switch in this local calling area. Instead, they must dial extra digits and incur toll charges in calling an ASAP San Marcos customer – even though the ASAP customer may be located in the same building as the calling party.

CenturyTel receives at least two benefits from the arrangement it convinced the Texas Commission to adopt. First, CenturyTel receives additional revenues, either through the assess-

⁴⁵ See *id.* at 19 ¶ 34.

⁴⁶ See *id.* at 11 ¶¶ 17-18. Of course, as noted above, “because wireless service is mobile and not fixed to a specific location, . . . the wireless service is not limited to use within that rate center.” *Intermodal Porting Order*, FCC 03-284, 18 FCC Rcd 23697 at ¶ 11 (Nov. 10, 2003).

⁴⁷ See TPUC Order at 19 ¶¶ 1-2.

⁴⁸ Letter from Brook Bennett Brown, CenturyTel attorney, to Scott McCollough, ASAP attorney, PUC Docket No. 25673 (Oct. 17, 2003).

ment of toll charges when they carry the call themselves, or by the assessment of access charges if they hand the call to a presubscribed interexchange carrier, on calls that it had historically rated as local.⁴⁹ Second, CenturyTel is able to make ASAP's competitive service offering less attractive to customers, because CenturyTel has effectively precluded ASAP from offering its customers an inbound local calling area that is equivalent to what CenturyTel offers its own customers. Stated differently, CenturyTel has effectively precluded ASPA from offering local service in its territory.

D. CENTURYTEL'S SCHEME VIOLATES THE FCC'S INTERCONNECTION RULES

An originating carrier has the obligation to transport its customer's calls to the terminating carrier's POI, so long as the terminating carrier maintains a POI within the LATA, and the financial obligation to compensate the terminating carrier for the cost of transport to the terminating carrier's switch serving the called party.⁵⁰ This obligation applies equally to all carriers, whether the originating carrier is a LEC or CMRS provider. Nevertheless, some incumbent LECs, and rural LECs in particular, have gone to great lengths to avoid the application of this rule. These incumbents would prefer a one-sided arrangement, whereby a wireless carrier pays for the costs of all transport for mobile-to-land calls (as it does today), and the wireless carriers pays for the costs of all transport for land-to-mobile calls. In other words, these incumbents want to impose on competitive carriers 100 percent of the cost of interconnection.

⁴⁹ CenturyTel's interconnection costs do not change whether it classifies calls to ASAP customers with locally-rated numbers as local or toll — because in either case, it must transport the calls from its San Marcos switch to the ASAP switch in Austin. However, by converting these calls to toll, CenturyTel generates new revenues that it did not previously receive — revenues that necessarily constitute net income (or profit).

⁵⁰ See, also, footnote 14, *supra*, noting that the transport obligation does not extend beyond the LATA boundary.

The problem the incumbents encounter is that their one-sided (and competitively unequal) position is flatly inconsistent with the unequivocal commands of the Communications Act, which imposes on LECs the “duty to establish *reciprocal* compensation arrangements for the transport and termination of telecommunications.”⁵¹ Moreover, for traffic that is subject to reciprocal compensation obligations, both the Commission and the federal courts have rejected LEC attempts to impose their interconnection costs on competitive carriers, such as charging the competitive carrier for the costs of the facilities the incumbent uses in delivering its own customer’s traffic.⁵²

At issue in this case is the attempt by one incumbent LEC to bypass the federal interconnection rules. Realizing that attempts to charge wireless carriers for the cost of transporting its own customers’ traffic would be futile (and unlawful), CenturyTel has instead decided to convert what had been local land-to-mobile calls into toll calls. By taking this simple step, CenturyTel is able to generate additional revenues for itself, and it can concurrently hamper severely the ability of wireless carriers to compete in the local telecommunications market because wireless carriers can no longer offer their customers an inbound local calling area equivalent to their own.

II. THE TEXAS PUC ORDER CONFLICTS WITH FEDERAL LAW

In the order that ASAP challenges, the Texas Commission accepted CenturyTel’s position that it can refuse to offer to wireless carriers the same inbound local calling area that it offers its own customers – unless the wireless carrier installs a switch in the local calling area (even when such a switch cannot be justified under cost or capacity considerations). This incumbent

⁵¹ 47 U.S.C. § 251(b)(5)(emphasis added).

⁵² See, e.g., *Mountain Communications v. FCC*, 355 F.3d 644 (D.C. Cir. 2004); *MCImetro v. BellSouth*, 352 F.3d 872 (4th Cir. 2003); *Southwestern Bell v. Texas Public Utilities Comm’n*, 348 F.3d 482 (5th Cir. 2003); *TSR Wireless v. U S WEST*, 15 FCC Rcd 11166 (2000), *aff’d* 252 F.3d 462 (D.C. Cir. 2001); *Virginia Arbitration Order*, 17 FCC Rcd 27039, 27064-65 ¶¶ 51-53 (2002).

LEC position is blatantly anti-competitive and discriminatory because CenturyTel imposes a new unacceptable Hobson's choice on wireless carriers:

- (a) A wireless carrier can use an efficient network architecture (*i.e.*, a centralized switch supporting services in multiple calling areas), but then most calls by incumbent LEC customers to the wireless carrier's customers will become toll calls; *or*
- (b) A wireless carrier can ensure that local calls are rated as local, but to do so, it must purchase and install a separate switch in each incumbent LEC local calling area.

Adoption of either alternative severely inhibits the ability of wireless carriers to compete against the incumbent LEC's own services. Installation of a switch in each local calling area when the capacity is not needed would substantially increase the price for wireless service relative to the prices the incumbent LEC charges for its services. Conversely, maintaining an efficient network architecture would convert most land-to-mobile calls into toll calls. Consumers will be reluctant to subscribe to wireless services if family, friends and colleagues must make toll calls to call them at their wireless handset. Notably, the incumbent LEC benefits regardless of the alternative that a wireless carrier chooses because with either alternative, the wireless carrier's service offering becomes less competitive *vis-à-vis* the incumbent LEC's own services.

**A. THE TEXAS PUC ORDER CREATES AN IMPERMISSIBLE ENTRY BARRIER
IN CONTRAVENTION OF SECTION 253(A)**

Congress, in Section 253(a) of the Communications Act, has declared unlawful any state requirement that "prohibit[s] or has the *effect of prohibiting*" any firm from providing "*any inter-*

state or *intrastate* telecommunications service.”⁵³ Congress enacted this provision to “ensure that no state or local authority could erect legal barriers to entry that would potentially frustrate the 1996 Act’s explicit goal of opening local markets to competition.”⁵⁴

The Commission has adopted a two-pronged test for determining whether a state requirement contravenes Section 253: “we first determine whether the challenged law, regulation or legal requirement violates the terms of section 253(a) standing alone. If we find that it violates section 253(a) considered in isolation, we then determine whether the requirement nevertheless is permissible under section 253(b). If a law, regulation, or legal requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), we must preempt the enforcement of the requirement in accordance with section 253(d).”⁵⁵

The Commission has held that a state requirement is unlawful under this “effect of prohibiting” clause if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”⁵⁶ The Commission has further ruled that *Section 253(a) bars states from “restrict[ing] the means or facilities through which a party is permitted to provide service”*:

[T]hese two [statutory] provisions, read together, provide that no state or local requirement may prohibit or have the effect of prohibiting any entity from providing any offering of telecommunications directly to the public for a fee *regardless of the facilities used*.⁵⁷

For example, at issue in the *Texas Preemption Order* was a state statute that imposed buildout requirements on certain competitive LECs (“CLECs”). The statute required CLECs to

⁵³ 47 U.S.C. § 253(a)(emphasis added).

⁵⁴ *Texas Preemption Order*, 13 FCC Rcd 2460, 3480 ¶ 41 (1997).

⁵⁵ *Id.* at ¶ 42.

⁵⁶ *Texas Preemption Order*, 13 FCC Rcd at 3470 ¶ 22.

⁵⁷ *Id.* at 3496 ¶ 74 (emphasis added).

use their own facilities for 10 percent of their service territory in the first year and 50 percent of their territory in the third year – thereby effectively precluding CLECs from alternatively using unbundled network elements (“UNEs”) or resold services.⁵⁸ This Commission preempted this statute because the buildout requirements impermissibly “restrict[ed] [CLECs] from determining for themselves the means by which they serve local markets.”⁵⁹ Noting that “Congress [has] expressly recognized that construction of redundant networks would be very costly,” the Commission found that enforcement of the challenged statute would have the effect of prohibiting entry because the “substantial financial investment” required to meet the buildout requirements would “clearly prevent [CLECs] from competing in a fair and balanced environment.”⁶⁰

Given this precedent, the Texas Commission’s ASAP/CenturyTel Order unquestionably has “the effect of prohibiting” ASAP from providing its desired (and FCC authorized) services in contravention of Section 253(a) of the Act. According to the Texas Commission, the only way that ASAP can obtain a local inbound calling area similar to what CenturyTel offers its own customers is to purchase and install a switch within the San Marcos local calling area. The Texas Commission imposed this requirement whether or not ASAP needs the switch capacity to serve its customers in the San Marcos local calling area, and it imposed this requirement even though federal law does not require wireless carriers to install a switch in every LEC rate center and even though federal law does not require a wireless carrier like ASAP to interconnect directly with CenturyTel. Significantly, the physical location of a switch has no bearing whatsoever on the called party’s location at the time of a call – the only question that the Texas Commission

⁵⁸ See *Texas Preemption Order*, 13 FCC Rcd at 3488 ¶ 57.

⁵⁹ *Id.* at 3505 ¶ 92.

⁶⁰ *Id.* at 3498 ¶ 78 and 3500 ¶ 81.

ruled is relevant to whether an incumbent LEC like CenturyTel may rate its customers' calls as local or toll.

The Texas Commission's "switch per rate center" requirement cannot be salvaged under Section 253(b) of the Act. The Texas Commission made no claim in its order that its new requirement is justified by Section 253(b) – that is, it is "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers" and is "competitively neutral."⁶¹ The physical location of a switch has nothing to do with advancing universal service, protecting public safety, improving service quality or safeguarding the rights of customers – and, in fact, undermines universal service because the cost of wireless services is needlessly increased. In addition, CenturyTel's refusal to provide to ASAP an inbound local calling area that is comparable to the calling area CenturyTel offers to its own customers certainly cannot be characterized as competitively neutral.

Because the Texas Commission's "switch per rate center" requirement has the effect of prohibiting ASAP from providing its desired services, and because this requirement cannot be justified under Section 253(b), this Commission "must preempt the enforcement of the requirement in accordance with section 253(d)."⁶² As the Commission has stated:

[S]ection 253 expressly empowers – indeed, obligates – the Commission to remove any state or local legal mandate that "prohibit[s] or has the effect of prohibiting" a firm from providing any interstate or intrastate telecommunications service.⁶³

⁶¹ 47 U.S.C. § 253(b)(emphasis added). The FCC has made clear that to sustain a requirement that contravenes Section 253(a), a state must show that its requirement is both necessary within the meaning of Section 253(b) and competitively neutral. *See, e.g., Silver Star Reconsideration Order*, 13 FCC Rcd 16356, 16360 n.18, 16361 ¶ 11 (1998); *Hyperion Order*, 14 FCC Rcd 11064, 11073 ¶ 18 (1999).

⁶² *Texas PUC Preemption Order*, 13 FCC Rcd at 3480 ¶ 42,

⁶³ *Id.* at 3470 ¶ 22.

It bears remembering that Congress enacted Section 253 to “ensure that no state or local authority could erect legal barriers to entry that would potentially frustrate the 1996 Act’s explicit goal of opening local markets to competition.”⁶⁴ Without question, the Texas Commission’s order requiring wireless carriers to install a switch in each LEC local calling area as a condition so their customers’ family, friends and colleagues can call them on a local basis “frustrates the 1996 Act’s explicit goal of opening local markets to competition.”

**B. THE TEXAS PUC ORDER CONSTITUTES IMPERMISSIBLE ENTRY REGULATION
IN CONTRAVENTION OF SECTION 332(C)**

The Texas Commission’s Order also constitutes entry regulation that is prohibited by Section 332(c)(3) of the Communications Act. This statute provides unequivocally that “no State or local government shall have any authority to regulate the entry of . . . any commercial mobile service.”⁶⁵ This prohibition is broader in scope than the entry prohibition contained in Section 253(a) of the Act. Whereas Section 253(a) makes unlawful state requirements that “prohibit or have the effect of prohibiting” any telecommunications service, Section 332(c)(3) makes unlawful *any state regulation* governing wireless carrier entry into the market. Federal courts have held that Section 332(c)(3) “completely preempts” state regulation of wireless carrier entry into their federally authorized markets.⁶⁶

The Texas Commission order has imposed a new requirement on wireless carriers so their customers can enjoy the same inbound local calling area that an incumbent LEC offers to its own customers – namely, the wireless carrier must install a switch in each LEC local calling area, even if this switch capacity is not needed.

⁶⁴ *Texas Preemption Order*, 13 FCC Rcd 2460, 3480 ¶ 41 (1997).

⁶⁵ 47 U.S.C. § 332(c)(3)(A).

Federal appellate courts have confirmed that under Section 332(c)(3), it is the FCC, and not the states, which has exclusive jurisdiction over the placement of wireless carrier network infrastructure:

These claims tread directly on the very areas reserved to the FCC: the modes and conditions under which AT&T Wireless may begin offering service in the Chicago market. The statute makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure, as well as the rates and conditions that can be offered for the new service. Should the state court vindicate Bastien's claim, the relief granted would necessarily force AT&T Wireless to do more than required by the FCC: to provide more towers, clearer signals or lower rates. The statute specifically insulates these FCC decisions from state court review.⁶⁷

The "switch per LEC local calling area" requirement that the Texas Commission has imposed on wireless carriers unquestionably constitutes the very entry regulation that Section 332 (c)(3) of the Communications Act explicitly prohibits.

C. THE TEXAS PUC ORDER IMPERMISSIBLY RELIEVES CENTURYTEL FROM PROVIDING DIALING PARITY

The Texas Commission's Order impermissibly exempts CenturyTel from its statutory obligation to provide dialing parity.⁶⁸ Under its order, a CenturyTel customer can call another incumbent LEC customer in the San Marcos local calling area (whether served by CenturyTel or SBC) by dialing only seven digits, while a CenturyTel customer calling wireless customer located in the same local calling area must dial eight digits (and incur toll charges).

⁶⁶ *Bastien v. AT&T Wireless Services*, 205 F.3d 983, 987 (7th Cir. 2000). *See also id.* at 986-87 ("There can be no doubt that Congress intended complete preemption when it said 'no State or local government shall have any authority to regulate the entry of or the rates charge by any commercial mobile service.'").

⁶⁷ *Bastien, supra*, 205 F.3d at 989.

⁶⁸ While the Texas PUC possesses the statutory authority to suspend CenturyTel's statutory dialing parity obligation under Section 251(f)(2) of the Act, CenturyTel did not seek relief under this provision and the Texas PUC did not discuss the criteria that Congress specified in Section 251(f)(2) for such a suspension.

Section 251(b)(3) of the Communications Act requires LECs like CenturyTel to provide dialing parity.⁶⁹ The Commission's implementing rules specify that a LEC "shall permit" its customers to dial "the same number of digits to make a local telephone call notwithstanding the identity of the customer's or the called party's telecommunications service provider."⁷⁰ As the Commission has explained:

[U]nder section 251(b)(3) each LEC must ensure that its customers within a defined local calling area be able to dial the same number of digits to make a local telephone call notwithstanding the identity of the calling party's or called party's local telephone service provider.⁷¹

The Commission has held that this LEC obligation to provide dialing parity extends to CMRS providers.⁷²

The Texas Commission has held that "[t]he location of the calling customer and the called customer should be used for purposes of retail rating ELCS calls" – that is, whether calls should be rated as local or toll and, therefore, whether calls can be dialed with seven digits or additional digits.⁷³ Under this definition, a call from a San Marcos CenturyTel customer to a San Marcos ASAP customer should be treated as a local call that can be dialed with seven digits. CenturyTel treats as local and permits its customers to dial only seven digits when they call another CenturyTel customer in San Marcos (or an SBC customer in Lockhart). Under CenturyTel's duty to provide local dialing parity, CenturyTel must permit its customers to dial only seven digits when they call a wireless customer who is physically located in this San Marcos local calling area.

⁶⁹ 47 U.S.C. § 251(b)(3).

⁷⁰ 47 C.F.R. § 51.207.

⁷¹ *Second Local Competition Order*, 11 FCC Rcd 19392, 19430 ¶ 71 (1996).

⁷² See *id.* at 19429 ¶ 68 ("We reject USTA's argument that the section 251(b)(3) dialing parity requirements do not include an obligation to provide dialing parity to CMRS providers.").

⁷³ See TPUC Order at 17 ¶ 19.

The Texas Commission appears to justify its decision to require LEC customers to dial extra digits in calling ASAP customers on the ground that it is “not possible” for CenturyTel to know the “geographic location” of the wireless customer being called.⁷⁴ But as noted above, LECs in Texas (like LECs nationwide) do not rate calls as local or toll based on the physical location of the calling party.

The Texas Commission further expressed concern that there may be “no geographic correlation between the exchanges with which ASAP has associated its NXXs and the location where a paging customer using an ASAP-supplied telephone number receives a paging call”:

ASAP does not use these NXXs to route an incoming page to a specific transmitter located in the exchange to which the number is nominally assigned. Rather, all transmitters broadcast simultaneously throughout ASAP’s territory, or even nationwide, depending on the paging plan selected by the ASAP customer.⁷⁵

Wireless carriers have historically provided their customers larger calling areas than what LECs offer their customers, but this difference does not change the way LECs rate their calls or determine how many digits LEC customers must dial. For example, CenturyTel treats as local and requires only seven digit dialing when one of its customers calls a Sprint PCS San Marcos customer – whether the Sprint PCS customer is located at home in San Marcos or happens to be traveling in Washington, D.C. at the time.

In addition, the Commission has squarely ruled that incumbent LECs like CenturyTel are obligated to provide dialing parity even when the terminating carrier has a larger local calling area than the incumbent:

By requiring that all customers “within a defined local calling area” be able to dial the same number of digits to make a local telephone call, we do not intend to re-

⁷⁴ TPUC Order at 11 ¶ 20.

⁷⁵ TPUC Order at 14 ¶¶ 37-38.

quire a competing provider of local exchange service to define its local calling area to match the local calling area of an incumbent LEC.⁷⁶

It bears emphasis that the size of ASAP's service area has no bearing on the costs CenturyTel incurs in routing its customers' calls to ASAP customers – because if an ASAP customer happens to be located outside of the San Marcos local calling area, it is ASAP which bears the cost of delivering the telecommunications to its customer, regardless of the location of the ASAP customer at the time of the call.⁷⁷ As the Commission has recognized, “because wireless service is mobile and not fixed to a specific location, while the wireless subscriber's number is associated with a specific geographic rate center, the wireless service is not limited to use within that rate center.”⁷⁸

The Texas Commission appears to have been concerned that ASAP offers its customers a larger inbound calling scope than CenturyTel offers its own customers.⁷⁹ One would ordinarily expect state regulators to support efforts by competitive carriers to offer consumers a greater range of alternatives than the incumbent has historically offered. In any event, the Commission has already rejected arguments that the LEC dialing parity obligation may be conditioned on the competitive carrier satisfying certain additional criteria. The Commission explained:

[F]or the Commission to make LATA-wide or state-wide service a precondition of entry into that LATA or state would be to erect a major legal barrier to entry,

⁷⁶ *Second Local Competition Order* at 19432 ¶ 75.

⁷⁷ As the Texas Commission notes, ASAP utilizes a Type 2A interconnection arrangement in the Austin LATA. See TPUC Order at 10 ¶ 12. For a local call (a call originating and terminating in the San Marcos local calling area), CenturyTel must deliver the call attempt to ASAP's POI in Austin. If the ASAP customer happens to be located outside of the local calling area at the time of the CenturyTel customer call (whether within or outside of the Austin LATA), CenturyTel must still deliver the call attempt to ASAP's POI in Austin. In other words, the physical location of the ASAP customer has no bearing on the way CenturyTel routes its calls to ASAP or on the costs CenturyTel incurs in delivering the calls to ASAP.

⁷⁸ *Intermodal Porting Order*, FCC 03-284, 18 FCC Rcd 23697 at ¶ 11 (Nov. 10, 2003).

⁷⁹ See TPUC Order at 14 ¶ 14.

particularly for smaller telecommunications services providers, that is contrary to the basic thrust of the 1996 Act.⁸⁰

D. THE TEXAS PUC ORDER CONFLICTS WITH FEDERAL NUMBERING RULES

Finally, the Texas Commission's Order should be preempted because it conflicts with the Commission's numbering rules, and the Texas Commission was without requisite legal authority to adopt the conditions it imposed.

Congress has given the Commission "exclusive" jurisdiction over the North American Numbering Plan.⁸¹ Pursuant to this authority, the Commission has adopted rules governing the circumstances that carriers may obtain numbering resources. For example, Rule 52.15(g) provides that a carrier such as ASAP may obtain numbering resources in any incumbent LEC "rate center" where the carrier is "authorized to provide service."⁸² As the Commission has acknowledged, under this rule, "wireless carriers . . . must request as many NXX codes as are required to permit wireless customers to be called by wireline customers on a local basis."⁸³ The only conditions that the Commission has imposed on obtaining numbering resources in a given local calling area is that the applicant be "authorized to provide service in the area for which the numbering resources are being requested" and be capable of "providing service within sixty (60) days of the numbering resources activation date."⁸⁴

The Texas Commission order effectively imposes an additional requirement for wireless carriers to obtain locally rated telephone numbers – namely, they must install a switch within the

⁸⁰ *Second Local Competition Order* at 19410 ¶ 30.

⁸¹ See 47 U.S.C. § 251(e)(1). While this statute permits the FCC to delegate some or all of this authority to states, the FCC has not delegated the issues involved in this proceeding.

⁸² 47 C.F.R. § 52.15(g).

⁸³ *Numbering Resource Optimization NPRM*, 14 FCC Rcd 10322, 10370-71 ¶ 112 (1999). See also *id.* at 10371 n.174 ("[T]o enable the rating of incoming wireline calls as local, wireless carriers typically associated NXXs with wireline rate centers that cover either the business or residence of end-users.").

⁸⁴ See *id.* at § 52.15(g)(2).

rate center as a condition to having locally rated numbers actually rated as local. Even ignoring the fact that the physical location of a switch has no bearing on how LECs rate calls as local or toll, the fact remains that, given the Commission's exclusive jurisdiction over telephone numbers, the Texas Commission does not possess the legal authority to impose additional criteria in order for competitive carriers to obtain the numbers they need so they can offer an inbound local area comparable to what incumbent carriers offer their own customers.

ASAP is correct when it states that the Texas Commission order, as a practical matter, "converts every one of ASAP's 13 Austin LATA NXXs into Austin NXXs."⁸⁵ Sprint has previously explained that incumbent carriers do not possess the authority to ignore the rating points that competitive carriers designate for their numbering resources.⁸⁶ Given the Commission's exclusive jurisdiction over telephone numbers, state regulators likewise lack the legal authority to order incumbent carriers to ignore the rating points that competitive carriers designate for their numbering resources.

III. THE COMMISSION SHOULD DECLARE THAT CENTURYTEL'S ACTIONS CONSTITUTE AN UNREASONABLE PRACTICE UNDER THE COMMUNICATIONS ACT

CenturyTel has erected a new barrier that inhibits the ability of wireless carriers to compete with CenturyTel's own services. CenturyTel benefits regardless of the "choice" that it has given to wireless carriers (*e.g.*, increase service prices to recover the sizable additional costs of unnecessary switch capacity, or forfeit the right to offer an inbound local calling area to wireless customers). This new incumbent LEC tactic is blatantly discriminatory and anticompetitive and constitutes an unreasonable practice regardless of how that term may be defined.

⁸⁵ ASAP Petition at 44.

⁸⁶ See Sprint Petition for Declaratory Ruling, CC Docket No. 01-92, at 16-17 (May 9, 2002).

Section 201(b) of the Communications Act prohibits an incumbent LEC like CenturyTel from implementing “any . . . charge, practice, classification, or regulation that is unjust or unreasonable.”⁸⁷ Historically, this statutory prohibition has applied to interstate traffic only.⁸⁸ However, in the Omnibus Budget Reconciliation Act of 1993, Congress expanded this Section 201(b) prohibition to encompass all traffic exchanged between LECs and CMRS providers, including intrastate traffic.

In Section 332(c)(1) of the Act, Congress explicitly extended to the Commission the authority to order interconnection between CMRS carriers and LECs like CenturyTel that is consistent with “the provisions of Section 201 of this title.”⁸⁹ However, and importantly, Congress concurrently exempted LEC-CMRS interconnection from Section 2(b) of the Act, which “generally reserves to the states jurisdiction over intrastate communications service.”⁹⁰ In this regard, Congress has explicitly stated:

The Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network.⁹¹

Consequently, the Commission’s jurisdiction over LEC-CMRS interconnection is plenary, and encompasses both interstate and intrastate traffic.

The Commission should therefore declare that CenturyTel’s discriminatory and anticompetitive arrangement constitutes an unjust and unreasonable practice under Section 201(b), and it

⁸⁷ 47 U.S.C. § 201(b).

⁸⁸ Under Section 2(b) of the Act as originally enacted, authority over intrastate communications was reserved to the states – except to the extent that state law conflicted with federal law. See 47 U.S.C. § 152(b); *Louisiana Public Service Commission v. FCC*, 476 U.S. 355(1986).

⁸⁹ 47 U.S.C. § 332(c)(1)(B).

⁹⁰ See *Unified Intercarrier Compensation Regime NPRM*, 16 FCC Rcd 9610, 9640 ¶ 84 (2001).

⁹¹ H.R. REP NO. 103-111, 103d Cong., 1st Sess., at 261 (1993).

should order CenturyTel to adopt an arrangement whereby the local calling area it offers to wireless carriers is the same local calling area it offers to other LECs and its own customers.

IV. THERE IS NO BASIS TO PREEMPT TEXAS STATUTES OR PUC RULES

ASAP asks the Commission to “preempt certain provisions of the Texas Public Utility Regulatory Act” and to “preempt certain TPUC substantive rules” that pertain to extended local calling service (“ELCS”).⁹² ASAP makes this request even though it concedes that these statutes and Texas Commission rules do not conflict with federal law:

*While these statutory and rule provisions do not on their face conflict with federal law, TPUC’s application of them results in a denial of federal rights held by ASAP, ASAP’s customers, and ILEC users seeking to call ASAP’s customer. To that extent the state statute and the TPUC rules must be preempted.*⁹³

There is no basis for federal preemption when the petitioner concedes that the statutes and rules it identifies do “not on their face conflict with federal law.” Moreover, the statutes and rules that ASAP identifies are not even relevant to its petition. According to ASAP, these statutes and rules address “the creation of ELCS” and involve only “the procedural method to expand a previously existing mandatory local calling scope for basis service to wireline customers; they are not substantive criteria that apply to individual calls after the mandatory local calling area is expanded.”⁹⁴ How ELCS areas are established has no bearing on the legal question presented by the petition: the proper rating of land-to-mobile calls where the wireless carrier has locally rated telephone numbers. Indeed, the fact that this legal issue arises in the context of an ELCS area is not germane to the dispute, because under both federal and state law, the same

⁹² ASAP Petition at 9 and 55.

⁹³ *Id.* at 4 (emphasis added). See also 4-5 (“The FCC must also preempt the Texas Utility Code and the TPUC rules to the extent they are interpreted in a manner that conflicts with federal law.”).

⁹⁴ ASAP Petition at 19.

method of call rating is utilized whether a local calling area is defined as one exchange or as an expanded ELCS area.⁹⁵

Sprint therefore recommends that the Commission deny this portion of ASAP's preemption petition.

V. CONCLUSION

For the foregoing reasons, Sprint respectfully requests that the Commission expeditiously grant the ASAP Petition and rule that CenturyTel's conduct constitutes an unreasonable practice under the Communications Act and that the Texas Commission order approving CenturyTel's proposal conflicts with, and is therefore preempted by, federal law.

Respectfully submitted,

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⁹⁵ See 47 U.S.C. § 153(47); ASAP Petition at 24-25.